Supreme Court, U.S.
FILED
MAY 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1078

World-Wide Volkswagen Corporation and
Seaway Volkswagen, Inc.,
Petitioners

v.

The Honorable Charles S. Woodson, District Judge of
Creek County, State of Oklahoma, Kay Eloise Robinson,
Eva May Robinson, a minor, by and through her father
and next friend, Harry Robinson, George Samuel Robinson,
a minor, by and through his father and next friend,
Harry Robinson, and Harry Robinson, individually,
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF OF RESPONDENT

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**ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF OKLAHOMA**

Opinion Below

The opinion of the Oklahoma Supreme Court, not yet reported, appears in the Appendix to petitioners' brief (1a-6a). The District Court of Creek County, Oklahoma, the lower court, rendered no opinion.

Jurisdiction

The basis for this Court's jurisdiction is properly stated in petitioners' brief and will not be repeated here.

Constitutional Provision and Statute Involved

These provisions and the statute involved are correctly stated in petitioners' brief and are not repeated here.

Question Presented

The question presented is whether the State of Oklahoma may exercise in personam jurisdiction over a New York seller of a defective automobile where the use of the automobile by the purchaser, while in Oklahoma, causes injury to the user.

Statement of the Case

Harry Robinson, a New York resident, and his wife, Kay Eloise Robinson, purchased an Audi automobile from Seaway Volkswagen, Inc., ("Seaway"), in Massena, New York on December 15, 1976.

The Audi automobile in question was manufactured by Audi NSU Auto Union Aktiengesellschaft in Germany. It was thereafter imported into the United States by Volkswagen of America, Inc., who is the distributor for all of the United States for all Volkswagen products, including Audi automobiles. Volkswagen of America, Inc. then sold and delivered the Audi automobile to the defendant distributor, World-Wide Volkswagen Corporation ("World-Wide"), who in turn sold and distributed this vehicle to ("Seaway") in Messena, New York. Defendant ("World-Wide") is a New York corporation, as is ("Seaway").

Both Volkswagen of America, Inc., and Audi NSU Auto Union Aktiengesellschaft are subsidiaries of Volkswagen of Germany. ("World-Wide") is the Audi distributor for the states of New York, New Jersey, and Connecticut. According to their published list of distributors and dealers, Volkswagen of America, Inc. has seven exclusive regional distributors located throughout the

United States. There are several hundred Audi dealerships throughout the United States and Canada, with Audi dealers in every state of the union, including Alaska and Hawaii, and including four in the State of Oklahoma. Their literature shows 24 dealerships within the State of New York alone, with 12 dealerships located in New Jersey, and 8 located in the State of Connecticut.

On the 21st day of September, 1977, Mr. Robinson, accompanied by his wife and children, was travelling near Sapulpa, Oklahoma, on the Turner Turnpike (I-44) which parallels old U.S. Highway 66 from Tulsa to Oklahoma City, when his Audi automobile was rear ended by another vehicle, resulting in a fire and holocaust as a result of the design and placement of the gas tank and the fuel system on the Audi automobile, which resulted in mutilating and disabling injuries to his wife and two children.

Plaintiff's wife and children were subsequently hospitalized at Tulsa, Oklahoma, for over five months, during which time plaintiffs filed suit against the defendant manufacturer, Audi NSU Auto Union Aktiengesellshaft; the importer, Volkswagen of America, Inc.; the distributor, World-Wide Volkswagen Corporation; and the local Audi dealer, Seaway Volkswagen, Inc.

All the defendants first sought to remove the action filed in Creek County District Court of Oklahoma, to the United States District Court for the Northern District of Oklahoma. The United States District Court for the Northern District of Oklahoma determined that plaintiffs, since they were in transit to a new home in Arizona, were still residents of New York, and that there was no diversity of citizenship between the plaintiffs and New York defendants, and therefore no basis for their jurisdiction. The case was remanded to the District Court of Creek County, Oklahoma, and thereafter the defendants sought a writ of prohibition in the Supreme Court of the State of

Oklahoma. The defendant manufacturer and distributor did not join in this petition for Writ of Prohibition.

On October, 10, 1978, the Oklahoma Supreme Court denied the writ of prohibition, holding that the District Court of Creek County could exercise jurisdiction under the Oklahoma's "Long-Arm" Statute, a "single act" statute, because, under the circumstances of the case, and under the evidence adduced in the Trial Court, it was established that the petitioners "derived substantial revenue from goods used in the State of Oklahoma." Oklahoma Statute, Title 12, Section 1701.03(a) (4).

The petitioners then filed a Petition for Writ of Certiorari in this Court.

ARGUMENT:

THE EXERCISE OF IN PERSONAM JURISDICTION BY AN OKLAHOMA COURT OVER A NEW YORK SELLER OF A DEFECTIVE AUTOMOBILE WHICH CAUSES INJURY TO ITS PURCHASER WHILE BEING USED IN OKLAHOMA, IS CONSTITUTIONALLY PERMISSIBLE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. OKLAHOMA HAS A CLEAR BASIS FOR JURISDICTION SINCE IT HAS A CLEAR INTEREST IN PROVIDING A FORUM FOR PERSONS INJURED WITHIN ITS BOUNDARIES BECAUSE OF POTENTIAL MEDICAL CREDITORS, PRESENCE OF WITNESSES, AND OTHER EVIDENCE.

This is not the first occurrence of this nature that has been considered by the District Courts of the United States.

In *Reilly vs. Phil Tolkan Pontiac, Inc.*, 372 F.Supp. 1205 (U.S.D.C.-D.N.J. 1974) a diversity action was instituted in the United States District Court for the District of New Jersey, against a Wisconsin automobile dealer for injuries sustained as a result of a defective jack which the defendant automobile dealer had sold to plaintiff in Wisconsin. Subsequently, plaintiff moved to New Jersey, where he sustained injury as a result of the defective jack.

The defendant, in the *Reilly* case, contended that the New Jersey Court did not have, under the doctrine of *International Shoe Company vs. State of Wisconsin,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), the "minimum contacts" with the State of New Jersey to bring the defendant within the court's diversity jurisdiction.

The Court noted that New Jersey's long-arm statute allowed **service to the uttermost limits permitted by the United States Constitution.** The Court went on to state that the New Jersey Courts have steadily allowed the extension of state long-arm jurisdiction in cases involving defective items sold in the general flow of commerce. The New Jersey Court cited a long list of cases allowing jurisdiction to be exercised under the long-arm statute, and particularly cited *Roche vs. Floral Rental Corporation,* 95 N.J.Super. 555, 232 A.2d 162 (App.Div. 1967), where suit was brought against a New York corporation that installed a refrigerator body in a truck owned by a company doing business in New York, where the truck was delivered to the owner in New York. The truck subsequently traveled in New Jersey, and there was an accident in which the refrigerator body's design was a contributing factor. The defendant there claimed that there was not sufficient contacts to allow jurisdiction under the New Jersey Court.

In the *Roche* case, the Court cited Restatement, Conflict of Laws 2d, Section 37 (May 2, 1967), which provides:

"A state has power to exercise judicial jurisdiction

over an individual who causes effects in the state by an act done elsewhere with respect to causes of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable."

The Court, in the *Roche* case, further cited the discussion of Section 37, as follows:

"[Jurisdiction is valid where]: (1) the act was done with the intention of causing effects in the state; (2) the act, although not done with the intention of causing effects in the state, could reasonably have been expected to do so; and [invalid where] (3) the act was not done with the intention of causing effects in the state and could not reasonably have been expected to do so."

The Court, in the *Roche* case, further pointed out that the use of a product in New Jersey was deemed to have been reasonably foreseeable, in view of the fact that much of the traffic from the New York City area to the rest of the country would normally pass through New Jersey.

The Court, in the *Reilly* case, adopted the holdings in the *Roche* case and held that it was not unreasonable to assume that defendant dealer should have anticipated that the Pontiac it sold to plaintiff and the jack within it would come to be used in other states, including New Jersey. The Court stated:

"Automobiles are items that by their nature, and by the driving habits of Americans, commonly traverse long distances. Tolkan (dealer) knew that it was selling a product that is distributed, and for which spare parts are available, throughout the nation. Further, the car sold to plaintiff in 1967 was a 1966 model, presumably with several years and much mileage remaining in its useful life. Tolkan is located in a major

metropolitan area, which reflects the mobile patterns of modern society. Thus, Tolkan should be prepared to defend on alleged defects in the product it sold which had consequences in New Jersey."

The *Reilly* case is certainly analogous to the present case under consideration where the defendant distributor, with 44 dealers throughout three heavily populated states, could certainly anticipate cross-country travel on Route 66, the most heavily traveled inter-continental route, which runs through Oklahoma. It is therefore reasonable for them to have anticipated that their products distributed in interstate commerce would be used and substantial revenue derived from the goods used in Oklahoma.

Furthermore, since defendants' list of authorized Audi dealers show that Oklahoma has four dealerships, two of which are located on Route 66 in Tulsa and Oklahoma City, it is reasonable to believe that eastern travelers in Audi automobiles traveling cross-country would certainly seek service in Oklahoma, with their Audi automobiles. As for the retail dealer Seaway, since it is located in a state which is the second most populated state in the United States, it too could reasonably anticipate the use of Audi automobiles in Oklahoma.

It can hardly be questioned that the fairness test is satisfied where the marketing channels bring the goods into the forum, so it is only a short step in logic to conclude that the "fairness" test it met when the customer himself, in the possession of a product mobile by its very nature, brings the product into the forum state himself and is using it for the intended purpose. Frumer and Friedman Products Liability, Section 4501. [Emphasis ours]

In *McCoy vs. Wean United, Inc.*, 67 F.R.D. 491 (D.C. Tenn), a manufacturer of a punch press sold it to a Michigan manufacturer after which the press was subsequently taken by Tennessee by the Michigan manufactur-

er's successor. It was held that the manufacturer of the punch press was subject to process in the Tennessee courts for injury which occurred in that state.

In *Dunnigan vs. A. H. Robins Company,* 559 P.2d 750 (Idaho 1977), an intra-uterine device, known as the Dalkon Shield, was inserted into plaintiff who lived in California, and who subsequently moved to Idaho, where infection and a tubal abscess developed, requiring surgical removal of her fallopian tubes, as a result of the defective design and manufacture, etc., of the Dalkon Shield. It was there held that the single "tortious act" was committed within Idaho, and the Court retained jurisdiction.

In *Phillips vs. Anchor Hocking Glass Corporation,* 413 P.2d 732, (Ariz 1966), annotated at 19 A.L.R.3d 1, PRODUCTS LIABILITY: IN PERSONAM JURISDICTION OVER NONRESIDENT MANUFACTURER OR SELLER UNDER "LONG-ARM" STATUTES, the Arizona Court held that it had jurisdiction over an Ohio corporation who had manufactured a dish which caused injury in Arizona. No allegation was made that the dish was purchased in Arizona, or that the defendant was doing business in Arizona at the time of the purchase, the time of the injury, or when the complaint was filed.

The Arizona Court, for injury sustained while using the dish in Arizona, allowed personal jurisdiction to be acquired by the Arizona Court over a nonresident defendant who had "caused an event to occur in this State out of which the claim which is the subject of the complaint arose." This statute, the Court stated, was intended to give Arizona residents the maximum privileges permitted by the Constitution of the United States, and held that it met the "minimum contacts," and "fairness" test of *International Shoe Company vs. State of Washington,* 326 U.S. 310, and *McGee vs. International Life Insurance Company,* 355 U.S. 220.

The Court, in the *Phillips* case, pointed out that the important trend in our notions of fairness has been a shift from emphasizing what is fair to the defendant, to a consideration what is fair to both parties. The Court went on to state as follows:

> "It has been said that fair play and substantial justice are satisfied if (1) the cause of action involves local contacts which make it reasonably desirable from plaintiff's point of view that the case be tried at the selected forum, (2) the defendant has sufficient causal responsibility for the presence of the local contacts in the forum state to permit us to conclude that he has by his own volition subjected himself to answering for them there, and (3) relevant public interests are served, or not disserved, by allowing the cause to be determined at that forum. Leflar, The Converging Limits of State Jurisdictional Powers, 9 Journal of Public Law 282.

The Court, in the *Phillips* case, in criticizing *Hanson vs. Denckla,* infra; wherein, the Supreme Court, in the *Hanson* case, had stated that the defendant must "purposefully" avail himself of the privilege of conducting activities within the forum State, noted that this language had given many state courts much confusion and observed that to construe it literally would be to revitalize the "implied consent" theory which was emasculated by the *International Shoe* case and to reverse the trend expanding state jurisdiction over nonresidents which trend was recognized in the *Hanson* decision. The Court pointed out that to make the requirement of "purposeful activity" within the state a necessary prerequisite to personal jurisdiction in all cases undermines the notion that the facts of each case must be examined to decide whether it is fair to exercise jurisdiction over the defendant.

The Arizona Court went on to note that tortious and

negligent acts are obvious examples in which it is unrealistic to say that the actors first considered the laws of the state in which such acts were committed. The Court stated:

> "A rule limiting jurisdiction to defendants who "purposefully" conduct activities within the state cannot properly be applied in product liability cases in view of the fortuitous route by which products enter any particular state." Cummins, In Personam Jurisdiction Over Nonresident Manufacturers in Products Liability Actions, 63 Mich.L.R. 1028.

The Arizona Court further noted that Professor Cleary, in his article "The Length of the Long-Arm," 9 Journal of Public Law 293, concluded that state courts hold that the commission of a tort within the territory of the forum, or sustaining injury within the territory of the forum from a tort committed elsewhere, is a sufficient contact upon which to base jurisdiction over the defendant as regards that tort.

In pointing out that the "purposeful activity" language of *Hanson* is deemed by some courts to be met if the event is foreseeable, the Court concluded that the requirements of fair play does not require that the event be forseeable, pointing out that a manufacturer's primary interest is the consumption of his product and not where it is consumed, and that he should be held liable for damage caused by his product, whether suit is brought in his state or in the plaintiffs state.

Fortunately, Justice Stevens notions of "fair notice" put forth in his concurring opinion in *Shaffer vs. Heitner,* 433 U.S. 186, provides a basis for understanding the requirement of purposeful activity as one that protects against unfair surprise, and Justice Marshall's opinions in both *Shaffer vs. Heitner,* and *Kulko* lend support to that interpretation.

In the *Shaffer* opinion, Mr. Justice Marshall dealt with the *Hanson vs. Denckla* test of "purposeful activity" in terms of a "reasonable anticipation of litigation in the forum state." In the *Kulko* opinion, Mr. Justice Marshall again invoked the same *Shaffer* language to make the point more forcefully as follows:

> "This single act is surely not one that a reasonable parent would expert to result in the substantial financial burden and personal strain of litigating a child support suit in a forum three thousand miles away, and we therefore see no basis on which it can be said that appellant could *reasonably have anticipated being* "hailed before a California Court." *Shaffer vs. Heitner.* (Emphasis ours)

It can thus be seen that in *Shaffer,* Mr. Justice Marshall opened the door for clarification of the *Hanson* test by speaking in several instances about the expectations and reasonable anticipations of the defendant. One year later in *Kulko,* he made the transition clear by adopting the standard that simply requires that the defendant could reasonably anticipate litigation in the distant form.

Mr. Justice Marshall's "reasonable anticipation" standard is fully consistent with Mr. Justice Stevens' notion of "fair notice" and reflects a retraction of whatever element of cognitive intent may have been inferred from the *Hanson* language.

It can thus be seen that the question now becomes one as to whether the New York seller could reasonably anticipate being "hailed before an Oklahoma Court." We suggest that he could for the reasons stated in the Supreme Court of Oklahoma's opinion.

It is interesting to note that the courts have not distinguished between a manufacturer and a distributor, or seller of a product. Restatement of Torts (Second) Section

402(a) speaks of "sellers" and does not distinguish between the remote manufacturer, distributor, processor, or seller. Oklahoma has held that the term manufacturer includes manufacture, processor, distributor, and sellers. *Fields vs. Volkswagen,* 555 P.2d 48 (Okl. 1976), and *Gray vs. American Radiator and Standard Sanitary Corporation,* 176 N.E.2d 761 (Ill 1961).

In *Gray vs. American Radiator and Standard Sanitary Corporation,* 176 N.E.2d 761 (Ill 1961), the defendant challenged the jurisdiction where he had manufactured a safety valve which he sold outside his jurisdiction to a radiator manufacturer who incorporated it in his product. The radiator was in the forum state when it exploded injuring the plaintiff. The Illinois Court held that since the injury occurred in that state, the statute was satisfied, the defendant was subject to jurisdiction over his person, even though this was only a single tortious act occurring within the forum, and that it met the "minimum contacts" requirement of *International Shoe* and satisfied traditional notions of fair play.

The cases of *Ajax Realty Corporation vs. J. F. Zook, Inc.,* 493 F.2d 818, (4th Cir. 1972), cert den 411 U.S. 966, 36 L.Ed.2d 687, 93 S.Ct. 2148, and *Golden Gate Hop Ranch, Inc. vs. Velsicol Chemical Corporation,* 403 P.2d 351, cert den 382 U.S. 1025, 86 S.Ct. 644, 15 L.Ed.2d 539, previously cited are, of course, cases holding that where injury arises in a forum state from the use of a defective product because of the act or ommission occurring outside the state the Court may properly exercise jurisdiction.

In *Rosenblatt vs. American Cyanamid Company,* 86 S.Ct. 1, (1965) Justice Goldberg concluded that the logic of the Supreme Court's decision, in *International Shoe Company vs. State of Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.2d 95, and *McGee vs. International Life Insurance Company,* 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.

2d 223, supports the validity of "long-arm statutes" which, like the New York statute involved, based in personam jurisdiction upon commission of a "tortious act" in the forum state. Justice Goldberg there stated:

> "In cases under these statutes in state and federal courts jurisdiction on the basis of a single tort has been uniformly upheld." *Smyth vs. Twin State Improvement Corporation,* 80 A.2d 664, 25 A.L.R.2d 1193; *Painter vs. Home Finance Company,* 96 S.E.2d 731; and *Hutchinson vs. Body & Sons Press Sales, Inc.,* 188 F.Supp. 876 (D.C.D.Mindd. 1960).

Justice Goldberg quoted from an article by Professor Currie, as follows:

> "Indeed, the constitutionality of this assertion of jurisdiction, today, could only be doubted by those determined to oppose the clear trend of the decisions. This situation is exactly that of the nonresident-motorist statutes, which were long ago upheld, except that the highways are not directly involved. It is now clear, if it was ever in doubt, that the nonresident-motorist cases were not really based on 'consent' but on the interest of the forum State and the fairness of trial there to the defendant." Currie, The Growth of the Long Arm, 1963 U.Ill.Law Forum 515, 540.

In the following product liability cases, included in an annotation in 19 A.L.R.3d 13, PRODUCTS LIABILITY: IN PERSONAM JURISDICTION OVER NONRESIDENT MANUFACTURER OR SELLER UNDER "LONG-ARM" STATUTE, it has been held, expressly or by implication, that the presence of a product in the state of the forum and injury resulting in that state may be a sufficient "contact" satisfying due process. *Harford vs. Smith,* (119 66 D.C.W.Va), 257 F.Supp. 578; *Anderson vs. National Presto Industries, Inc.,* 135 N.W.2d 639 (Iowa 1965); *Atkins vs. Jones and Laughlin Steel Corpor-*

ation, 104 N.W.2d 888 (Minn 1960); and *Metal Matic, Inc. vs. Eighth Judicial District Court,* 415 P.2d 617 (Nev 1966).

The Colorado Court has also held in the case of *Texair Fliers, Inc. vs. District Court, First Judicial District,* 506 P.2d 367 (Col), that where an aircraft owners conduct in failing to inspect an aircraft and in failing to determine the proficiency of the pilot occurred in a foreign state, which negligent acts thereafter resulted in a crash in Colorado, the aircraft owner could be subjected to the long-arm jurisdiction of the Colorado Court and held that the commission of a single tort within the state without any additional "minimum contacts" would give the Colorado courts jurisdiction.

The New York courts, in the case of *Gonzales vs. Harris Calorific Company,* 64 Misc.2d 287, 315 N.Y. Supp.2d 51, aff'd 35 App.Div.2d 720, 315 N.Y.Supp.2d 815, held that where the plaintiff was injured when an oxygen pressure regulator and high pressure gauge of welding equipment exploded and injured him in New York, the foreign sellers and manufacturer were subject to the jurisdiction of the New York courts where this equipment had been manufactured by an Ohio corporation, sold to a New Jersey corporation which in turn sold it to another New Jersey corporation, who then sold it to its New York affiliate where it was sold to plaintiff's employer prior to the time that plaintiff used and was injured by the product.

We respectfully submit to the Court that the only "contact" that the State of New York has with this case, other than the residence of the petitioning defendants, is that the Audi automobile was sold in New York.

The Oklahoma Court was clearly within the limits of due process in exercising In Personam Jurisdiction over the Defendants under the holdings of this Court.

The Supreme Court of Oklahoma, has, as has the Court in *Reilly vs. Phil Tolkan Pontiac, Inc.,* supra, repeatedly held that the Oklahoma Long-Arm Statute was intended to and does extend jurisdiction of the Oklahoma courts over nonresidents to the outer limits permitted by the due process requirements of the Federal Constitution, and is to be construed to widen constitutional bases upon which the Court of Oklahoma may exercise in personam jurisdiction consistent with due process. *Fields vs. Volkswagen of America, Inc.,* 555 P.2d 48 (Okl 1976), 84 A.L.R.3d 1199; *Carmack vs. Chemical Bank New York Trust Company,* 536 P.2d 895, (Okl 1975); and *Hines vs. Clendenning,* 465 P.2d 460 (Okl 1970).

The Supreme Court of Oklahoma was fully conscious of the constitutional limits of due process and exceedingly cautious in the exercise of personal jurisdiction over the petitioners through service under the Uniform Interstate and International Procedure Act. 12 O.S. (1971), Section 1701.01, et seq. and commonly referred to as the Oklahoma Long-Arm Statute.

This Court will give great weight to the determination and findings of the Supreme Court of Oklahoma, that:

> "In the case before us, the product being sold and distributed by the petitioners is by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma. This is especially true of the distributor, who has the exclusive right to distribute such automobile in New York, New Jersey and Connecticut. The evidence presented below demonstrated that goods sold and distributed by the petitioners were used in the State of Oklahoma, and under the facts we believe it reasonable to infer, given the retail value of the automobile, that the petitioners derive substantial income from automobiles which from time to time are used in the State of Oklahoma.

This being the case, we hold that under the facts presented, the trial court was justified in concluding that the petitioners derive substantial revenue from goods used or consumed in this State.

"Because the trial court was justified in concluding that the petitioners derived substantial revenue from goods used within the State, and because alleged acts or omissions on the part of petitioners outside the State allegedly caused tortious injury in this State, we hold that the trial court had the power, pursuant to 12 O.S. 1971, § 1701.03(a)(4), to exercise personal jurisdiction over the petitioners. As the trial court had such power, we refuse to issue a writ of prohibition.

The findings and the determination of the Supreme Court of Oklahoma, we respectfully submit, is fully consistent with the prior rulings of this Court and comply with the requirements of due process under the Fourteenth Amendment of the Constitution of the United States.

We call the Court's attention to the fact that in the trial court, the District Court of Creek County, Oklahoma, in the case of each of the plaintiffs who were injured in the accident involving the Audi automobile, not only World-Wide Volkswagen Corporation and Seaway Volkswagen, Inc., were named as defendants, but their sister and affiliated corporations, all with subsidiaries that are largely controlled by Volkswagen Aktiengesellschaft were joined as party defendants. Each of the cases named Audi NSU Auto Union Aktiengesellschaft, Volkswagen of America, Inc., World-Wide Volkswagen Corporation, and Seaway Volkswagen, Inc., as party defendants.

B. THE EXERCISE OF JURISDICTION BY OKLAHOMA COURTS MEETS THE TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE.

Among the principal factors that commonly arise in considering the fairness factors are the (1) relative aggressiveness of the parties;[1] (2) the relative economic burden of prosecuting or defending the action;[2] (3) the importance of the governmental interest to be vendicated;[3] (4) the convenience of the forum from a litigational efficiency point of view;[4] (5) the necessity of litigation in the chosen forum;[5] (6) the availability of alternative forums;[6] (7) alternative methods for resolving the dispute;[7] (8) the impact of the forum's choice of law doctrine.[8] Professor W. Woods' "Pennoyer's Demise," 20 Ariz.L.Rev. 1601.

In considering the "fairness factors", as it applies to our case, it can be seen that both defendants seek customers for their highly mobile product and can thus reasonably anticipate the possibility of liability producing events anywhere in the country.

In particular, World-Wide Volkswagen Corporation proclaims that knowledge in it's corporate name. *Clay vs. Sun Insurance Company*, 376 U.S. 179 ("World Wide" floater policy anticipates loss anywhere.) Although Oklahoma is not one of the states in which it does business, they are, nevertheless, fully prepared for multi-state litiga-

[1] *Pegler vs. Sullivan*, 432 P.2d 593 (Ariz 1967), and R. Cramton, D. Curie, and H. Kay, *Conflict of Laws*, 556 (2d Ed 1975)

[2] *McGee vs. International Life Insurance Company*, 355 U.S. 220, and *Phillips vs. Anchor Hocking Glass Corporation*, 413 P.2d 732 (Ariz 1966)

[3] *McGee vs. International Life Insurance Company*, 355 U.S. 220; *Mulane vs. Central Hanover Bank & Trust Company*, 339 U.S. 306; and *Fisher Governor vs. Superior Court*, 347 P.2d 1 (Cal 1959).

[4] See footnote 3.

[5] *Mulane vs. Central Hanover Bank & Trust Company*, 339 U.S. 306

[6] *Buckeye Boiler Company vs. Superior Court*, 458 P.2d 57 (Cal 1969)

[7] *Kulko vs. Superior Court*, 436 U.S. 84 (1978)

[8] *Buckeye Builder Company vs. Superior Court*, 458 P.2d 57 (Cal 1969) *and Gray vs. American Radiator & Standard Sanitary Corporation*, 176 N.E.2d 761 (Ill 1961)

tion in products liability cases. There is no rational basis for a principaled distinction between the defendant's business region and Oklahoma, other than the name of the state and distance. In this regard, the problems associated with travelling from New York City to Norwich or Messena, N.Y. are not substantially different from travelling from New York to Oklahoma. Out of town accomodations, the transportation for witnesses, and other difficulties associated with litigation in the distant forum are the same in either Tulsa or Messena. The difference is only an hour or so of flying time and a few hundred dollars.

As for the relative economic burdens, they clearly weigh heavily in favor of the plaintiffs. The defendants are undoubtedly insured and even if not, their ability to internalize the cost of the litigation is much greater than the plaintiffs. There exists the substantial cost of transporting the plaintiffs' witnesses and evidence to New York, since the bulk of the medical witnesses and evidence concerning the accident itself is located in Oklahoma. While the cost of litigation in New York may not prohibitive, it would, nonetheless, impose a much more substantial burden upon the plaintiffs than litigation in Oklahoma would impose upon the defendants and their insurers.

A factor that looms large in the case at hand is the fact that the remaining defendants, namely the manufacturer and the distributor, have submitted to the jurisdiction of the Oklahoma Court, and the trial as to them will go forward. If the distributor and dealer defendants are removed from the case, the litigation will be completed and have to be duplicated in New York. Additionally, the plaintiffs will be deprived of any tactical advantage which comes from having all of the defendants in litigation at one time. It should be noted that the Volkswagen dealer defendant undertakes to provide service on a national basis. It is a member of a highly integrated service sales structure, *Crose vs. Volkswagenwerk Aktiengesellschaft,* 558 P.2d 764 (1977), and can anticipate customers from anywhere in the United States. It too should anticipate litigation involving the law of any forum in which an accident may occur.

If jurisdiction is not maintained in the Oklahoma Court, New York would be the only other available forum, since the possibility of litigation in Arizona would seem slight in view of the decision of the Arizona Court in *Houghton vs. Piper Aircraft Corporation,* 542 P.2d 24 (Ariz 1975). Unlike *Kulko,* there is no alternative forum or alternative methods, such as the Uniform Reciprocal Support Act which is fair to both the plaintiffs and defendants. Oklahoma is a fair accommodation of all interests.

There are no choice of law factors which has any bearing upon this case. The strict liability rules in both New York and Oklahoma are practically the same. Thus, there can be no unfair surprise of the magnitude involved in *Hanson vs. Denckla.* Certainly, the plaintiffs were not forum shopping.

Under the existing circumstances and in view of the efficiency of litigation in Oklahoma, and the apparent financial resources of the defendants, the assertion of jurisdiction by Oklahoma seems to meet the "fairness factors."

The defendants have cited the language of Judge Sobeloff in the case of *Urlinger Mills, Inc. vs. Cohoes Fiber Mills, Inc.,* 239 F.2d 502 (4th Cir 1956); however, we are not here concerned with a dealer defendant who is a small filling station owner in a remote California village, but rather with a large enterprise dealing in a multi-state market, who can reasonably anticipate litigation in a broad array of distant forums because of the inherent mobility of their product. It is suggested that the assertion of jurisdiction over these defendants should be decided by a frank

and open weighing of the fairness of asserting jurisdiction in the particular case at hand and not by application of preemptive rules. The convenience of trial in Oklahoma, the fact that the trial will continue in regard to the national and international defendants in Oklahoma, the lack of an alternative forum that is convenient to the plaintiffs, the relative economic conditions of the parties, and the absence of any countervailing fairness consideration from the defendants point of view all point towards upholding Oklahoma jurisdiction. Professor W. Woods' "Pennoyer's Demise," 20 Ariz.L.Rev. 1601.

The problems associated with asserted jurisdiction over a small local dealer, as dealt with by Judge Sobeloff in the *Urlinger Mills* case are obviously real. However, the argument cuts both ways since to require a purchaser of a small article to return three thousand miles to the place of purchase may impose the same hardships as the defendant would experience in defending the action in the home state of the purchaser. This argument should not form the basis for a decision of the jurisdictional issues, but the Court should consider the fairness factors in determining where jurisdiction should be exercised in product liability cases.

C. THE OKLAHOMA COURT IS THE MOST CONVENIENT FORUM FOR THE TRIAL OF THIS ACTION.

The convenience of the parties has been recognized as an element to be considered in considering the "fairness" test in *Hanson vs. Denckla,* 78 S.Ct. 1228, as well as *McGee vs. International Life Insurance Company,* 355 U.S. 220, and *International Shoe Company vs. State of Washington,* 326 U.S. 310, 66 S.Ct. 154. That the convenience of the parties, while not a substitute for jurisdiction, is a factor to be considered was also recognized by the Arizona Court in the *Phillips vs. Anchor Hocking Glass Corporation case,* infra, where the Court pointed

out that the immobility of our lower economic class is well known, and that the Court should consider the nature of the cause of action, including the applicable law and the practical matters of trial.

In this case (1) the accident occurred in Oklahoma; (2) the injuries were sustained in Oklahoma; (3) the law of Oklahoma would be applied to this case; (4) the witnesses to the accident, giving rise to plaintiffs' injuries, are in Oklahoma; (5) the hospital records and the treating physicians are in Oklahoma; and (6) the plaintiffs, at the time the suit was filed, was confined in the hospital in Oklahoma. If the case were tried in New York, against these defendants, all the witnesses, records, and exhibits would have to be taken to New York.

The trial of the action against the manufacturer and importer would still be in Oklahoma since they have not joined these defendants in challenging the jurisdiction of the Oklahoma courts.

Certainly, Oklahoma is the most convenient place to try this lawsuit. Six major airlines serve Tulsa, Oklahoma, and the only real connection that the State of New York has with this case is the fact that the car was sold there.

This is a case of extreme importance and great magnitude to the plaintiffs. This accident has been a most terrible tragedy to the family. Medical cost has pauperized the Robinsons. They cannot and they should not be forced to assume this extraordinary burden.

We respectfully submit the trial of the action against the manufacturer, Audi NSU Auto Union Aktiengesellschaft, and as against the importer, Volkswagen of America, Inc., would still be held in Oklahoma, since those defendants joined issue and admitted the jurisdiction of the Oklahoma Court. They have refused to join with petitioners in petitioners' Application for Writ of Certiorari.

They had refused and did not join with these petitioners in the Application for a Writ of Prohibition to the Supreme Court of Oklahoma.

The trial of this action, in the opinion of counsel, may well exceed three or four weeks; the record will be voluminous and the costs staggering.

D. THIS MATTER IS MOOT BECAUSE THE DEFENDANTS HAVE ENTERED A GENERAL APPEARANCE.

The defendant, World-Wide Volkswagen Corporation, in a pleading entitled SPECIAL APPEARANCE, DENIAL OF JURISDICTION AND VENUE, challenged the jurisdiction of the Oklahoma Trial Court not only over the person of the defendant, but jurisdiction of the *subject matter* as well, and further asked for dismissal of the action because of lack of the Court's jurisdiction over the *subject matter.* (Appendix, p.25)

While the authorities are split on whether this would constitute a general appearance, 5 Am.Jur.2d, *Appearance,* Section 21, page 496, Oklahoma has clearly ruled that challenging the jurisdiction of the Trial Court over the subject matter does constitute a general appearance. *Webster vs. Crump,* 246 P. 423 (Okl 1926); *Jameson vs. Harvel,* 280 P. 1080 (Okl 1929), and *Severson vs. Home Owners Loan Corporation,* 88 P.2d 344 (Okl 1939).

In an annotation, OBJECTION BEFORE JUDGMENT TO JURISDICTION OF COURT OVER SUBJECT MATTER AS CONSTITUTING GENERAL APPEARANCE, appearing at 25 A.L.R.2d 833, the authors have listed the majority jurisdictions where this rule is followed.

Both defendants, World-Wide Volkswagen Corporation and Seaway Volkswagen, Inc., have participated in the taking of plaintiffs' depositions on other than jurisdictional grounds in which they inquired at great length about the liability issues and the plaintiffs' damages involved in the action. Although they attempted to make these inquiries without prejudicing themselves by stating that they were not waiving any of their rights in doing so, this was not pursuant to any stipulation or agreement of counsel. By participating in the taking of depositions on non-jurisdictional issues, both defendants entered a general appearance. 5 Am.Jur.2d, *Appearance,* Section 21, page 497, and *Ada Dairy Products vs. Superior Court of Seminole County,* 258 P.2d 939 (Okl 1953).

A real and substantial federal question is essential to the jurisdiction of the U.S. Supreme Court over judgments of state courts. The federal question cannot be one that is moot. *Kimball vs. Kimball,* 174 U.S. 158, 43 L.Ed. 932, 19 S.Ct. 639, *Little vs. Bowers,* 134 U.S. 547, 33 L.Ed. 1016, 10 S.Ct. 620. 32 Am.Jur.2d, Federal Practice and Procedure § 252, P. 720.

CONCLUSION

In virtually every case presented to this Court, from *McGee* to *Ajax Realty vs. Zook,* (cert den), defendants have insisted upon a return to the doctrine of *Pennoyer vs. Neff.* The charge is leveled that the application of the long-arm statute involved to the defendants in the particular case, extends the State Court jurisdiction beyond the constitutional limit and removes all bearers from exercising in personam jurisdiction in any case. This Court has readily rejected such argument and has consistently refused to return to *Pennoyer.*

The test is not that automobile dealers may be subjected to suit in particular cases, the test that this Court has established is does it offend "traditional notions of fair play and substantial justice."

This Court, some 25 years ago, discerned a trend toward expanding the prospective scope of state jurisdiction under foreign corporations and other nonresidents. This, the Court said, was attributable to a fundamental transformation on the American national economy under the years.

With the enormous increase of nationalized communications, interstate commerce transportation; with the enormous mobility of the American citizen, with some 400 million automobiles traveling transcontinental highways, it is well that the Court recognize that where dangerous and defective products are placed in the hands of innocent purchasers, there is in fact a greater responsibility which the manufacturer and seller of such an instrument must recognize.

It is a matter almost as simple as this. Either an unbearable burden must be placed upon the plaintiffs, or the defendant seller must recognize its responsibility.

Because the defendants have entered a general appearance and the case is now moot, and because the Oklahoma Court is the only forum which meets the "traditional notions of fair play and substantial justice" in this case, and because the exercise of in personam jurisdiction of the Oklahoma Court is clearly within the perimeter of due process, the jurisdiction of the Oklahoma Court should be sustained.

Respectfully Submitted,

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